

1                   UNITED STATES DISTRICT COURT  
2                   EASTERN DISTRICT OF NEW YORK

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4           UNITED STATES OF AMERICA, : 21-CR-550(DC)  
5                 -against- : United States Courthouse  
6           ERIC GOLDSTEIN, et al., : Brooklyn, New York  
7                 Defendants. : May 22, 2023  
8                                      : 3:00 o'clock p.m.  
9                   ----- X

10                   TRANSCRIPT OF ORAL ARGUMENT  
11                   BEFORE THE HONORABLE DENNY CHIN  
12                   UNITED STATES CIRCUIT JUDGE.

13           APPEARANCES:

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16    BY: ROBERT POLEMENI  
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29    LEILA BIJAN, ESQ.

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31    PATRICK LOOBY, ESQ.  
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34           Court Reporter:             Charleane M. Heading  
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36           Proceedings recorded by mechanical stenography, transcript  
37    produced by computer-aided transcription.

1           THE CLERK: Criminal cause for oral argument on  
2 United States versus Goldstein, docket number 21-CR-550.

3           May I have the appearances for the government,  
4 please.

5           MR. POLEMENI: Good afternoon, Your Honor. Robert  
6 Polemeni, Laura Zuckerwise, Andrew Grubin and Kaitlin McTague  
7 for the United States.

8           THE COURT: Good afternoon.

9           MS. ZUCKERWISE: Good afternoon, Your Honor.

10          MR. GRUBIN: Good afternoon, Your Honor.

11          MS. McTAGUE: Good afternoon, Your Honor.

12          THE CLERK: For the Defendant Goldstein?

13          MR. SUNDARAM: Kannan Sundaram and Neil Kelly,  
14 Federal Defenders of New York. Good afternoon.

15          THE COURT: Yes. And just state if your client is  
16 present and if not, that the appearance is waived.

17          MR. SUNDARAM: So my client is not present. He's  
18 actually ill today so his appearance is waived.

19          THE COURT: Okay.

20          THE CLERK: Michael Kelly, Kathleen Shannon and  
21 Elpitha Lambros from Akerman on behalf of Blaine Iler and  
22 Mr. Iler is with us here today.

23          THE COURT: Good afternoon.

24          THE CLERK: For the Defendant Turley?

25          MR. GOELMAN: Good afternoon, Your Honor. Aitan

1 Goelman and Leila Bijan for Michael Iler who is not here and  
2 waives his presence.

3 THE COURT: All right.

4 THE CLERK: For the Defendant Twomey?

5 MS. SAHARIA: Good afternoon, Your Honor. Amy  
6 Saharia and with me is Zach Warren, Patrick Looby and Tobin  
7 Romero for Mr. Twomey and Mr. Twomey is not present and waives  
8 his appearance.

9 THE COURT: Good afternoon.

10 THE CLERK: Thank you very much. Please be seated.

11 THE COURT: Did you introduce yourself?

12 MR. GOELMAN: I introduced her, Your Honor. This is  
13 Leila Bijan.

14 THE COURT: I see. Okay.

15 We have motions in limine, motions to quash. This  
16 is far more litigation than I have seen, I can't remember  
17 there being so much before, right as we are about to start a  
18 trial. I'm not sure what the reason for that is. I think  
19 there were three filings today. I think there was a filing an  
20 hour ago.

21 I was at the Fordham Law School graduation. I have  
22 not had a chance to read the additional filings. I won't be  
23 able to rule on everything today. We don't have responses to  
24 everything so we'll go through. I'm going to rule on as much  
25 of this as I can and then we'll have to figure out when I can

1 deal with the other things.

2 Are there any preliminary matters that anyone wants  
3 to address? Otherwise, I'll run through these motions as best  
4 as I can.

5 No? Okay. Well, let me do this. And there were  
6 filings over the weekend as well.

7 The defendants' motion for more time for opening  
8 statements, one of the problems is that when I first asked  
9 this question last week, the response was an hour per  
10 defendant which would be four hours of openings when the  
11 government said that it was asking for 30 minutes and probably  
12 would only take 20. It just seemed such a disparity and  
13 unlike, frankly, any criminal trial I've done where opening  
14 statements would be so long. I understand there are four  
15 defendants, but the government has got to cover four  
16 defendants in its opening statement as well.

17 In any event, that said, I will allow 20 minutes per  
18 defendant for a total of 80 minutes. If the defendants want  
19 to whack it up a little differently, that's fine, but there  
20 will be a total of 80 minutes. If you can't agree, then  
21 20 minutes per defendant, and that's the best I'm going to do.

22 Let me proceed to the government's 404(b) motion  
23 which is docket number 88.

24 The government moves to admit either as direct  
25 evidence Mr. Goldstein's corrupt intent or under Rule 404(b),

1 to show knowledge and awareness of his obligations. There  
2 were three items: Failure to disclose to the DOE and the  
3 conflict of interest board its ownership interest in RMSCO;  
4 two, that he regularly communicated with the DOE Ethics  
5 Office; and, three, that in March of 2017, he obtained a loan  
6 and instructed the lender to pay the proceeds to RMSCO rather  
7 than to Goldstein, rather than to him personally, and some  
8 statements along those lines.

9                  Relatedly, something came in regarding experts as  
10 well which involved the issue of whether there's expert  
11 testimony on the issue of complying with the rules.

12                  Anyone want to add anything to the papers?

13                  MR. GRUBIN: Your Honor, I'm happy to I guess have  
14 to take the opportunity to respond. I can try and cover both  
15 404(b) and then also, I guess, the expert issue. I did see  
16 the filing over the weekend. We didn't respond but I think I  
17 can orally if that's all right with Your Honor.

18                  THE COURT: That's fine.

19                  MR. GRUBIN: So as an initial matter, just for  
20 starters, the defense knows well who Samantha Biletsky is.  
21 They've had her e-mail communications, between her and  
22 Goldstein in discovery for over a year now. In addition, they  
23 likewise know, they've also had the COIB conflict of interest  
24 forms.

25                  THE COURT: Is the government intending on calling

1 her as an expert?

2 MR. GRUBIN: No, and I'm happy to get to that in a  
3 minute, Your Honor.

4 THE COURT: Okay.

5 MR. GRUBIN: The answer is no, Your Honor, and I'll  
6 speak more about that.

7 They've also known that in some form, this conflict  
8 issue was going to come up all along. It's basically, it's  
9 just --

10 THE COURT: The witness would say what the rules  
11 were and that --

12 MR. GRUBIN: She's going to --

13 THE COURT: -- Mr. Goldstein did not comply?

14 MR. GRUBIN: Basically, what she's going to say or  
15 what we expect her to say is her interactions with Goldstein,  
16 mostly in the form of e-mails about his obligations, getting  
17 waivers for certain conflicts, Goldstein getting approval for  
18 travel, Goldstein seeking advice on payments by outside  
19 vendors, and she's also going to testify I expect that  
20 Goldstein never asked her or sought a waiver for all things  
21 relating to SOMMA, RMSCO, no travel approval for all things  
22 SOMMA. These are independently established facts -- at trial,  
23 they're obviously going to be independently established facts  
24 at trial and, yes, a response to what would you have said had  
25 he sought a waiver for that.

1           This is not -- these are, and I'm happy -- I guess  
2 I'll move quickly into the expert portion and then come back  
3 to 404(b) if that's all right, Your Honor.

4           THE COURT: That's fine.

5           MR. GRUBIN: So on the expert component, again,  
6 she's going to be testifying for the most part on her personal  
7 knowledge. She will say, I expect -- you know, I expect she  
8 will say it's a very straightforward rule which is Government  
9 Exhibit 45, a two page sheet that lists the rules that  
10 Goldstein would have received and did receive as a public  
11 official at the DOE.

12          It says things like, I mean this is, the rule is --  
13 you know, the rules are things like, that -- sorry. I want to  
14 get the exact language from the form. It's, you know, it says  
15 that public servants -- things like public servants need  
16 waivers if they're going to do business with the City or, you  
17 know, public servants may not use their City positions to  
18 benefit, and I'll find the exact language shortly, but any  
19 person or firm with whom they have a business or financial  
20 relationship.

21          She's been there for 15 years. These are things  
22 that are well within the ken of, like, what the jury can  
23 understand. These are not complicated. This is very  
24 straightforward stuff.

25          The reason, by the way, why this is relevant is not

1 because he was -- and this goes to the 404(b) too, Your Honor.  
2 The reason we're introducing this is not because of some sort  
3 of, to prove up that he violated his conflict of interest,  
4 conflict of interest laws and, therefore, is guilty of a  
5 bribery scheme. The reason is because the defendants  
6 including Goldstein are charged with honest services wire  
7 fraud and an element of that charge is that Goldstein  
8 knowingly participated in a fraud, in a scheme to defraud the  
9 DOE by means of false pretenses or representations. That is  
10 deception. And deceitful statements include half truths or  
11 concealments of facts. I believe that's both, in both jury  
12 charges, at least it's in the government's.

13           While it's certainly not required, it's also  
14 certainly relevant to that material omission that Goldstein  
15 was well aware of certain conflicts and disclosures and things  
16 of this sort that he had to make do and he did not do so and  
17 also, for that matter, it's relevant under 666, Federal  
18 Program Bribery, because the defense appears to intend to  
19 argue, again, from their voir dire and from the jury  
20 instructions which say things like, you know, it's totally  
21 fine that the defendant had this business with these outside  
22 vendors which is, by the way, you know, I think that should be  
23 precluded and we can talk about that later because it's, of  
24 course, not, you know -- putting that aside, it appears  
25 they're going to tend to argue that these are all bona fide

1 transactions and you don't conceal bona fide transactions. So  
2 this stuff is direct, these things are direct evidence.

3 Again, I apologize. I've jumped a little bit  
4 between had 404(b) and expert, but I think they overlap and  
5 I'm happy to continue and talk a little bit more.

6 THE COURT: I'm happy to hear from defense.

7 MR. GRUBIN: Thank you.

8 THE COURT: Let me hear from defense counsel.

9 MR. LOOBY: Your Honor, Patrick Looby on behalf of  
10 Brian Twomey and I will be speaking to the expert portion and  
11 I understand that counsel for Mr. Goldstein will be speaking  
12 to the 404(b) opposition.

13 THE COURT: All right.

14 MR. LOOBY: On the expert piece, the testimony that  
15 the government has disclosed for the first time in their  
16 opposition to defendant's motions in limine falls into four  
17 categories: One of which, and I'm quoting from their brief,  
18 is their personal knowledge of Mr. Goldstein's disclosure or  
19 lack of disclosure to the DOE and the conflict of interest  
20 board; two, their knowledge of the purpose and framework of  
21 the DOE's and conflict of interest board's disclosure and  
22 conflict of interest rules and regulations; three, whether  
23 Mr. Goldstein complied with those rules and requirements; and,  
24 four, how the witnesses would have responded to Goldstein if  
25 he had made certain disclosures.

1           Category number one which is the first category that  
2 counsel for the government addressed which is the witnesses'  
3 personal interactions with Mr. Goldstein regarding, you know,  
4 what they interacted with him with regards to travel and what  
5 materials were made available to him. That's not challenged  
6 as expert in defense motion at ECF 113, but the other three  
7 categories do cross the 702 line.

8           The government's primarily relying on the Second  
9 Circuit's case in United States v. Cuti for the ability to ask  
10 these witnesses hypothetical questions regarding, you know,  
11 what they would have done if Mr. Goldstein had made certain  
12 disclosures. In defendant's motion, we explain, you know, the  
13 various ways in which Cuti is not apposite here. Here, we do  
14 not have a limited hypothetical. We have a very open-ended  
15 hypothetical. This is, you know, what advice would you have  
16 given, would you have determined that whatever disclosure they  
17 claim Mr. Goldstein should have made --

18           THE COURT: Isn't it common when you have issues of  
19 reliance, materiality, et cetera, to ask a witness what the  
20 witness would have done or what would have happened if the  
21 information had been complete or truthful? I think it's a  
22 common thing.

23           MR. LOOBY: Well, it's common, Your Honor, mostly in  
24 wire fraud cases where the materiality of a false statement  
25 upon the recipient is being evaluated. So the recipient would

1 testify, you know, if I had known fact X, I wouldn't have  
2 wired them the money. If I had known this, I wouldn't have  
3 done that. In Cuti, there was a separate but related concept  
4 of, well, what would the company's financial statements have  
5 looked like if you had known fact X which was independently  
6 established.

7 Here, we don't have an allegation that Mr. Goldstein  
8 ever consulted either of these witnesses in realtime regarding  
9 these disclosures. In fact, the government's allegation is  
10 the opposite, it's that he concealed this information from  
11 them. So they have no contemporaneous percipient knowledge  
12 that's relevant to the case. So what they would be asking to  
13 opine on is, you know, well, exactly what would you have done  
14 and here, it's not clear what the relevance of that is other  
15 than, I suppose, that the government is going to try to elicit  
16 testimony that they would have told him that the, that he  
17 would need a waiver or that his interest in RMSCO would have  
18 violated the rules.

19 That leads me to the second point of both in Cuti  
20 and in the Second Circuit cases of Rega and Bank of China, the  
21 court has made very clear that lay opinion testimony crosses  
22 the line when it applies the facts of the case to either rules  
23 of professional conduct or regulations or laws and it crosses  
24 that line and says, yes, you, in fact, you broke this rule.

25 That under any cases that we have cited in our brief

1 would be clearly expert and we don't have an expert disclosure  
2 from these witnesses. The government maintains that it's  
3 patently obvious that Mr. Goldstein's interest in RMSCO would  
4 have violated these rules, but we don't even know which rules  
5 they claim that he violated.

6           We've attached to our motion the relevant rules.  
7 They're spread across -- different bodies are promulgating  
8 them. There's different provisions. None of the government's  
9 disclosures, both the 302s that have been provided, have the  
10 witnesses tied any of the facts of this case to a particular  
11 regulation. So we haven't been given the disclosure or the  
12 opportunity to respond to that.

13           The first time that we've heard -- and the  
14 government says that we knew the disclosure issues would begin  
15 the case. The very first time when they said that they would  
16 ask somebody to opine on whether or not Mr. Goldstein's  
17 conduct crossed the line and constituted a violation was in  
18 their May 15th opposition to our motions in limine. That's  
19 two weeks ahead of trial. It's too late.

20           THE COURT: Okay. Let me hear from, is it Mr.  
21 Sundaram?

22           MR. N. KELLY: Neil Kelly, Your Honor.

23           THE COURT: Mr. Kelly.

24           MR. N. KELLY: Thank you.

25           Briefly, on the 404(b) issue, I think the government

1 in its presentation conflated the same two issues that we've  
2 pointed out in our written submission which is the fact of  
3 whether Mr. Goldstein told witness X, Y or Z about his  
4 interest in RMSCO and whether he had a legal obligation to  
5 disclose that information under either the DOE rules or the  
6 COIB rules or some of the, the regulations that counsel for  
7 Mr. Twomey just identified. So I think it's important to  
8 disentangle those because it affects what the analysis is  
9 under rules 404(b) and 403.

10 On the 404(b) issue, as we wrote in our papers, it  
11 sounds like the government reiterated today that it will be  
12 proceeding on a theory that Mr. Goldstein engaged in  
13 undisclosed self-dealing.

14 As the Supreme Court addressed in Skilling, that is  
15 not within the ambit of honest services fraud as charged and  
16 so we think that allowing that evidence and that argumentation  
17 to go to the jury will inevitably lead to the 403 issue that  
18 we disclosed or discussed which is a confusion of what is  
19 actually being presented to the jury, what elements do they  
20 actually need to decide to determine whether Mr. Goldstein  
21 committed the charged offenses, and if they are going to be  
22 distracted by this body of civil regulations, we're not only  
23 going to have a trial within a trial about what those  
24 regulations are, when did they apply to him, what did they  
25 require, when did he need to disclose certain information, but

1 also the jury will then be tempted to convict him for  
2 potentially violating civil regulations, not the criminal  
3 statutes with which he's charged. So we think that that's  
4 both a 404(b) issue and a 403 issue.

5 I think the Second Circuit decision in Quattrone  
6 actually goes to that issue pretty clearly which in that case,  
7 there was an allegation of witness tampering and obstruction  
8 of justice within the context of an SEC investigation. There  
9 was other evidence put in front of the jury that Mr. Quattrone  
10 had not complied with other SEC requirements and disclosure  
11 obligations. The Second Circuit overturned the conviction of  
12 that case. That was one of the many reasons, but what the  
13 court said was that that evidence of violations of potential  
14 civil regulations tempted the jury, even though it was  
15 probative in that case, that it tempted the jury to convict  
16 Mr. Quattrone on the improper basis, and we think that that's  
17 exactly the case here as well.

18 So I think the government just needs to be clear  
19 about what it is actually proposing to do because I think the  
20 proposed evidence fails under both 404(b) and 403.

21 THE COURT: Some of it, we're just going to need to  
22 see what shakes out at trial.

23 Has there been an indication made of what rules  
24 require disclosure? Have you provided that?

25 MR. GRUBIN: Yes. I mean there are a couple of

1 things, Your Honor, just on the 404(b).

2 Again, there's Government Exhibit 45, but there are  
3 two real Exhibits. One is Government Exhibit 45 and, again,  
4 these rules are not as complicated as I feel like the defense  
5 is trying to make them sound. It's fairly straightforward.  
6 These are two -- public servants, you know, may not use their  
7 City positions to benefit those whom they have a business or  
8 financial relationship.

9 THE COURT: So I don't have the exhibit in front of  
10 me. So Government's Exhibit 45 sets forth the rules and --

11 MR. GRUBIN: Government Exhibit 45 --

12 THE COURT: I'm trying to ask a question here.

13 It sets forth the rule and that's the rule that the  
14 government contends he should have complied with?

15 MR. GRUBIN: Yes. Government Exhibit 45 is a  
16 two-page fact sheet that Goldstein would have received when he  
17 filled, that he received when he filled out his financial  
18 disclosure forms.

19 Now, there is a -- as defense rightfully points out,  
20 there, like, other -- there's City rules and City laws and  
21 things about interest and other things. We're not planning on  
22 getting into any of that. I think it is very self-explanatory  
23 to a jury that, like, hey, and it's not self-dealing. I mean,  
24 yes, he was doing that too, but that's not what we're trying  
25 to, that's not the point here.

1           The point is it is, of course, something he -- it  
2 is, of course, an admission when you do not tell the DOE  
3 ethics officer that you are engaged in a business, you are  
4 making decisions about a business you have partnerships with.

5           THE COURT: I heard enough. We can't take this much  
6 time on every application.

7           The government's motion to admit this evidence is  
8 granted. I'll allow it as 404(b) evidence.

9           I'm accepting the government's representation that  
10 the rules in question are the very simple ones and not  
11 anything complicated. If the government at any point tries to  
12 offer something more complicated, more complex, then  
13 defendants are free to object. I find that the evidence is  
14 relevant. It's probative of intent. It's relevant to the  
15 issues of deception and fraud and the probative value  
16 outweighs the danger of unfair prejudice.

17           I think it's important to know -- the communications  
18 with Ms. Biletsky, I think, are fine. I mean she communicated  
19 with Mr. Goldstein about a number of issues. It seems to me  
20 that's not expert testimony. I mean there may be -- it comes  
21 close to being expert testimony in terms of whether he  
22 complied with the rules, but if we're talking about something  
23 really simple, I don't see it as an issue.

24           If it becomes something more complex and it's a  
25 complicated conflict of interest rule, then we'll cross that

1 bridge when we get there, but for the time being, the  
2 government may proceed with this evidence, all three parts of  
3 that motion.

4           Turning to the defendant's joint motion in Limine,  
5 Docket No. 96, there are four parts: Testimony from or  
6 regarding the DOE employee who choked, reportedly had choked;  
7 photographic evidence of the foreign matter; any testimony  
8 regarding the risk the incidents posed to children's safety;  
9 testimony from witnesses about how the incidents made them  
10 feel.

11           I'm inclined to deny the motion to exclude as to the  
12 first three parts. I'm inclined to grant the motion as to how  
13 the witnesses felt. I'm not sure what that means, but if the  
14 defendants want to add anything, feel free.

15           MR. LOOBY: Yes, Your Honor, very briefly.

16           The defendants submit that it's important to  
17 evaluate these four pieces of evidence for their marginal  
18 probative value above what will be undisputed and uncontested  
19 at trial.

20           The government maintains it needs these four pieces  
21 of evidence, including the testimony of the choking victim, to  
22 provide context surrounding the final alleged quid pro quo,  
23 the context being that the chicken tenders were on hold, that  
24 the defendants had a motive to get them back on hold.

25           Those facts are not going to be disputed that the

1 tenders were on hold, that it was due to issues of bones and  
2 foreign matter in the tenders. This is really, Your Honor, a  
3 question about what did these additional challenged pieces of  
4 evidence add to that context. Defendants submit that these  
5 pieces do not add anything of marginal probative value, but  
6 they do have a danger to inflame. They have a danger to  
7 distract the jury as well.

8 If the government is pursuing the argument that the  
9 children or school children were at risk, the defendants put  
10 them at risk and that the school children were the victims of  
11 the harm, defendants intend to and will be forced to  
12 vigorously contest that.

13 As we submitted in our motion, that is misleading.  
14 Issues unfortunately arise in food products in the DOE  
15 regularly, including the companies that are not new start-ups  
16 like SOMMA. To imply that the evidence regarding the issues  
17 of tenders is probative evidence of whether or not there was  
18 bribery in this case would be misleading and needs to be  
19 contextualized with this other evidence.

20 Additionally, defendants conducted a thorough  
21 investigation, the SOMMA defendants did, into the root cause  
22 of the issue. They submitted a corrective action to the DOE  
23 and they ultimately tried the case in a Texas civil court  
24 where the manufacturer and the two suppliers of the raw  
25 material were found to be responsible. This is all, should

1 not need to be contextualized to such a degree, but if the  
2 jury is going to hear that the defendants put children at  
3 risk, defendants will be forced to do that.

4 So we've heard and understood Your Honor's tentative  
5 ruling, but we ask the Court to either reserve or to assess in  
6 context these four pieces of evidence with their marginal  
7 probative value in light of the evidence that will be  
8 undisputed at trial.

9 THE COURT: Well, I understand that the defendants  
10 aren't challenging some parts of it, but it seems to me it's  
11 important how bad things were. The government is entitled to  
12 show that that things were pretty bad.

13 Yes, of course, it's prejudicial if there is  
14 evidence that children were endangered, but if indeed the  
15 government's allegations are true, then perhaps they were in  
16 danger. It just seems to me that it is relevant, that the  
17 probative value is high.

18 I'm happy to give -- I should have said this with  
19 the first, the 404(b) motion as well. I'm happy to give a  
20 limiting instruction, I'm happy to give a limiting instruction  
21 here, but it seems -- I mean I thought about this and it's  
22 also, there's a counter-motion on the other side and it seems  
23 to me the evidence should come in.

24 How witnesses felt, does the government want to  
25 address that? I don't see how that is terribly helpful.

1 MS. ZUCKERWISE: No, Your Honor, no need, and the  
2 government is happy to rest on its papers on this argument and  
3 has no objection to a limiting instruction.

4 THE COURT: All right. Yes. Defendants can submit  
5 a proposed limiting instruction.

6 So I'll grant the motion as to item four, part four,  
7 how incidents, how witnesses felt as a consequence of the  
8 incidents.

9 Defendants' motion number two: Exclude evidence of  
10 events that occurred after the charged conduct including 2017  
11 allegations of foreign matter in SOMMA's chicken tenders, the  
12 2017 loan and evidence of how Goldstein spent funds received  
13 as part of the scheme.

14 I'm inclined to allow the evidence of the 2017  
15 allegations to permit the government to complete the story. I  
16 think the events of 2017 are relevant.

17 This was also raised in another issue. I don't see  
18 how Mr. Goldstein's divorce or spending monies on his divorce  
19 is relevant and it could be prejudicial. I don't see how  
20 communications between the lawyers as they're trying to  
21 resolve that case would be relevant or admissible.

22 I think the government is entitled to show that the  
23 funds were used for personal reasons, personal purposes. I  
24 understand that some of it was used to pay RMS's lawyers but  
25 not all of it and, you know, I think, I think it is relevant.

1           The finding of more foreign matter in 2017, I think,  
2 is also relevant. I mean SOMMA had been permitted to continue  
3 selling and look at what happened. I think it comes in. I  
4 think the probative value outweighs the danger of unfair  
5 prejudice.

6           That's where I'm at on that. Does anybody want to  
7 add anything?

8           MR. GRUBIN: Just very briefly, Your Honor.

9           The government hasn't or at least I haven't had a  
10 chance to look yet at the divorce motion that I think was  
11 filed this morning. The only, my only response generally  
12 would be there might be very specific statements by the  
13 defendant in it that could be pertinent.

14           I think, for example, saying things like, I have --  
15 and this could be -- I don't have it in front of me but I  
16 think he makes references about SOMMA, about RMSCO that might  
17 be relevant. I think we would have to be very careful to work  
18 with the defense to almost redact everything else. I think  
19 there's also a statement about -- it's also later when we're  
20 talking about motive or Goldstein talks about being strapped  
21 for money, strapped for cash. There might be -- and it puts  
22 it in context.

23           Again, I think we would have to be careful about it  
24 and I'm happy to read what the defense submitted and see if we  
25 can work something out.

1           THE COURT: Well, yes, I mean, I think, of course,  
2 you should read what the defendant submitted, but my  
3 inclination is that much of it is not relevant, not probative  
4 and potentially prejudicial. Apparently there are e-mails  
5 about the children, et cetera. I don't -- and also, it's the  
6 lawyers talking apparently to try to resolve things. I don't  
7 see how that's relevant.

8           If there are specific statements that Mr. Goldstein  
9 made as opposed to his lawyers that could be relevant, then  
10 that's a different story and, yes, be careful, discuss it with  
11 defense counsel and maybe you'll surprise me and agree on  
12 something.

13           MR. GRUBIN: Thank you, Judge.

14           THE COURT: Okay.

15           Motion number three: Exclude lay testimony on  
16 whether a recall should have been issued regarding SOMMA's  
17 chicken tenders.

18           I don't know that there's a real disagreement here.  
19 I think the parties -- I don't think it's important whether  
20 you call it a recall or not and so I don't know whether we  
21 should fight about whether it's a recall or whether we should  
22 have expert testimony on whether it's a recall.

23           So I would be inclined to grant that motion to the  
24 extent that, you know, we're not going to take evidence on  
25 whether it was a recall within the parameters.

1 MS. ZUCKERWISE: Your Honor, may I be heard on this?

2 THE COURT: Yes.

3 MS. ZUCKERWISE: Just very briefly. The government  
4 has no intention to put in any evidence that would argue  
5 whether or not it should have been a recall or reimbursement  
6 or a hold, but there are some e-mails that say it was a recall  
7 and those will come into evidence, I expect, because they will  
8 be relevant to other matters.

9 So the issue will be raised but the government is  
10 not going to attempt to prove up whether it properly was  
11 called a recall or not.

12 THE COURT: Yes, I mean there may be e-mails that  
13 say the chicken tenders should have been recalled. It's  
14 almost using the word in its everyday meaning as opposed to  
15 something technical but -- yes?

16 MR. LOOBY: Yes, Your Honor, very briefly.

17 The government should not be permitted then, if this  
18 is their position, to argue that or insinuate that the  
19 classification that the DOE eventually took was in any way  
20 connected to the allegations of bribery in this case.

21 Our concern with this evidence is that it's a, the  
22 e-mails that reflect a dispute between a important government  
23 witness and SOMMA regarding the classification of this  
24 important event in the case and, ultimately, that witness'  
25 view, which is legally incorrect which is, again, not

1 disputed, is not followed by the DOE.

2                   What we are concerned about and want to avoid is  
3 getting that lumped in as another instance in which the  
4 government is alleging or implying or it's left to hang out  
5 there before the jury that Mr. Goldstein had something to do  
6 with that or is alleged to have when the government does not  
7 even allege that.

8                   So we would submit that testimony concerning this  
9 topic and documents concerning this topic, the unfair  
10 prejudice from injecting this incident into the case will  
11 outweigh whatever minimal probative value which the government  
12 hasn't articulated other than just to say that it's going to  
13 be relevant to some other issue.

14                  THE COURT: Well, I mean I think what I'm saying is  
15 we're not going to get into the issue of whether this was in  
16 fact a recall within the meaning of the regulations or  
17 protocols or whatever.

18                  To the extent that these communications bear on the  
19 other allegations, the bribery allegations, the fact that the  
20 word "recall" is used does not disqualify that evidence from  
21 coming in, but we want to be careful about it. This is  
22 another area where we can give a limiting instruction to the  
23 jury and, you know, along the lines of there is no issue as to  
24 whether there should have been a recall, I'm not sure how you  
25 phrased it. In other words, there could be some kind of

1 instruction given as well if need be to address any concerns  
2 that the jury is going to be led astray by communications  
3 referring to recalls.

4 MR. LOOBY: Yes, Your Honor, and I suppose when and  
5 if these documents are offered by the government, we just  
6 assess whatever probative value they're able to articulate at  
7 that point against the 403 risk that we've identified in our  
8 motion.

9 THE COURT: Yes, I mean if something comes up in  
10 context, you're free to make another objection. What I'm  
11 saying is that, in general, I don't have a problem with the  
12 fact that communications used the word "recall" as long as  
13 it's clear that whether there was, in fact, a recall is not an  
14 issue in the case and the parties seem to agree that whether  
15 it should have been classified as a recall is irrelevant and,  
16 therefore, that should not be proven up and cannot be proven  
17 up.

18 MR. LOOBY: Thank you, Your Honor.

19 THE COURT: Okay.

20 Motion number 4A, I'm not sure these are in the  
21 right order: Exclude witness testimony concerning  
22 hypothetical events of what witnesses would have done or how  
23 they felt had they known about Goldstein's interest in RMSCO.

24 I think I covered that already. Is there something  
25 different or is this the same? This is what-if-you-had-known

1 questions.

2 MS. ZUCKERWISE: That's correct, Your Honor.

3 Your Honor did cover it with respect to two potential  
4 government witnesses, Ms. Biletsky and Ms. Miller.

5 There's one additional witness who might be asked  
6 hypothetical question. That's Jeff Richards who is an  
7 investor in SOMMA. For the same reasons, it's standard in  
8 fraud cases, the defense acknowledged, to ask, to put  
9 documents in front of a witness and say was this shown to you  
10 and what would you have done differently if it had been.

11 THE COURT: All right. So it's covered by my prior  
12 ruling. Obviously, if something is pure speculation, then  
13 there can be an objection made and I would likely sustain the  
14 objection if it's pure speculation, but I think this is an  
15 appropriate case for what-if-you-had-known questions about  
16 facts that had been withheld.

17 If the witnesses had known about Mr. Goldstein's  
18 relationship with other, the other defendants and, in  
19 particular, his financial interest in the other entity, what  
20 would they have done, I think those are appropriate.

21 Yes?

22 MR. LOOBY: Yes, Your Honor, just very briefly.

23 On the application of the Cuti analysis to the SOMMA  
24 investor, we submit that this testimony is even farther afield  
25 from the limited hypothetical testimony that was permitted in

1 that case in which the accountants were talking about, well,  
2 how would these facts have impacted your very technical, the  
3 financial statements that you were preparing.

4           Here, I think this would open up the door for  
5 speculation to somebody whose views as an investor is not  
6 alleged to have been a victim of any of the crimes. It's not  
7 really clear exactly what the relevance of what he would have  
8 done has to any of the government's allegations much and so.

9           THE COURT: Let me hear again about the investor.  
10 I'm not quite sure.

11           MS. ZUCKERWISE: Sure, Your Honor.

12           In this case, there was a significant investor in  
13 SOMMA who was not told that SOMMA owned a significant portion  
14 of RMSCO. He'll be shown documents, I anticipate, where it is  
15 clear that SOMMA did own a significant portion of RMSCO.  
16 He'll be asked if he had seen these before or if he knew about  
17 them at the time or knew them at the time that SOMMA was an  
18 owner of RMSCO. Then he will, I suspect, be asked what he  
19 would have done differently at the time if he had known about  
20 it.

21           This is squarely under Cuti which says that --

22           THE COURT: He would have said, what, he wouldn't  
23 have invested?

24           MS. ZUCKERWISE: Yes, he wouldn't have invested or  
25 he would have walked away once he learned.

1           THE COURT: And how does that show, how does that  
2 prove up the bribery allegations?

3           MS. ZUCKERWISE: Your Honor, it tends to show some  
4 of the reasons for concealment, that everybody in the ambit of  
5 the defendants knew that what was happening was unlawful, was  
6 bribery, and there wouldn't have been legitimate investors.  
7 It's relevant because the defense intends to argue, we  
8 understand, that the entire RMSCO business was legitimate.  
9 This is not a legitimate practice, concealing something like  
10 this from your investor.

11          THE COURT: Just --

12          MR. LOOBY: Your Honor, very briefly.

13          There's no allegation of fraud against the SOMMA  
14 investors and testimony along this line falls squarely within  
15 the line of cases that we cite in our motion.

16          THE COURT: The defendants are arguing this was all  
17 a legitimate business and everything SOMMA did was on the up  
18 and up?

19          MR. LOOBY: That's right, Your Honor. So his  
20 interest in RMSCO was legitimate and we will argue that at  
21 trial.

22          THE COURT: I'll allow the evidence. I'll allow the  
23 evidence. I'm not persuaded. I think it's relevant.

24          Now, 4B: Defendants move to exclude testimony that  
25 aspects of the DOE-SOMMA relationship were strange, unusual or

1 made the witness uncomfortable.

2 My initial reaction was to allow some of this if the  
3 dealings and the relationship were unusual, that these were  
4 observations that would seem relevant, but then there's  
5 another, there was a later motion regarding unusualness that  
6 the government was, wanted to put in evidence that something  
7 was -- I'm sorry. I lost it now. There was a later request  
8 to allow, the government wanted to keep out evidence that  
9 something was unusual.

10 Am I getting it wrong?

11 MS. ZUCKERWISE: Well, Your Honor -- I'm sorry.

12 MS. SAHARIA: I'm happy to address that, Your Honor.

13 THE COURT: Yes.

14 MS. SAHARIA: I think you're referencing the  
15 government's motion where they are seeking to exclude evidence  
16 related to other food vendors, other food products. That's in  
17 the government's motion in limine.

18 One of our arguments, not our only argument but one  
19 of our arguments is if the witnesses are going to say that  
20 certain things were strange or unusual with respect to SOMMA,  
21 we have to be able rebut that to show how things were.

22 THE COURT: If a witness testifies that something  
23 was unusual, why shouldn't defendants be able to put on  
24 evidence that it was not unusual, right?

25 MS. SAHARIA: Exactly, Your Honor.

1 THE COURT: If that's what you're saying.

2 MS. SAHARIA: Yes.

3 MS. ZUCKERWISE: If I may?

4 THE COURT: Yes.

5 MS. ZUCKERWISE: Your Honor, the evidence is not  
6 going to show that this was the closest relationship that Eric  
7 Goldstein ever had with any vendor or that he didn't have  
8 close relationships with other vendors. It's going to show,  
9 there will be a proper foundation laid, that he had a close  
10 relationship with this vendor and that it appeared that this  
11 vendor got favorable treatment. That doesn't mean that that  
12 vendor got better treatment than any other vendor.

13 So putting in a litany of other vendors and other  
14 products and other evidence about those food products to try  
15 to disprove that point is not going to be probative of the  
16 issue because it's -- they would have to put in evidence about  
17 every single other vendor before the DOE in order to say that  
18 it was not, that it did not appear to these DOE witnesses that  
19 Mr. Goldstein was particularly close to this vendor.

20 THE COURT: Yes. I mean I think it's appropriate  
21 for the government to put in evidence that SOMMA received  
22 favorable treatment based on observations, not necessarily  
23 impressions. I don't think a witness can say, in my gut, my  
24 gut reaction is that this was strange or unusual. That, to  
25 me, does not seem correct, that that should not come in.

1           I think if the government puts in evidence that  
2 witnesses observe that SOMMA received favorable treatment, I  
3 would think it's probably fair game if there is evidence that  
4 other vendors received similar treatment so that it wasn't  
5 that different, I think. I'm not sure. I don't think it  
6 opens up the door to show that vendors did lots of other bad  
7 things in and of itself. So it's hard to thread the needle  
8 here and it may be that we'll have to, we'll have to see.

9           I mean I think observations that SOMMA received  
10 favorable treatment could indeed be relevant to whether it was  
11 bribed, I mean whether Goldstein was bribed, I mean that's the  
12 point, so that SOMMA could receive favorable treatment.  
13 That's why they purportedly bribed Mr. Goldstein. So I think  
14 to that extent, it is relevant. Whether the door is opened to  
15 things by other vendors, we'll have to see and I would want to  
16 keep a tight reign on that, but on some of that, we'll just  
17 have to wait and see what happens.

18           MR. SUNDARAM: Your Honor, can I just add something?

19           THE COURT: Yes.

20           MR. SUNDARAM: I'm understanding your inclination or  
21 your ruling to be making a distinction between witnesses'  
22 impressions and actual evidence from which a jury could infer  
23 that there had been, that there was preferential treatment  
24 here. And I'm sorry if this mixes 4-A with 4-B. This might  
25 be more in IV-A but I think there's overlap here.

1           On the question of witnesses' impressions, our  
2 contention, my contention is that for a DOE witness to say if  
3 I had known about his relationship with these other, with  
4 SOMMA, I would have done something differently, that falls in  
5 the same category and is utterly irrelevant to my client's  
6 intent. That's the difference between the cases that support  
7 the government, the Cuti case, and other cases.

8           In this case, the issue is whether Mr. Goldstein,  
9 for example, had an intent to bribe or corrupt intent. So the  
10 fact that a DOE witness would have done something differently  
11 doesn't shed any light on Mr. Goldstein's intent unless he  
12 knew that.

13           THE COURT: I don't know whether it sheds light on  
14 his intent or not, but it sheds light on other issues that  
15 are, you know, that are part of the trial including the issues  
16 I articulated earlier. I'm not changing my mind on that. I  
17 think we've exhausted that.

18           Motion number five: Preclude the government from  
19 introducing any argument that taxpayers are victims of the  
20 charged offenses.

21           I don't know if there's a real disagreement. The  
22 government cannot argue that the jurors as taxpayers are being  
23 harmed. That would definitely be improper. The government  
24 can argue that the Department of Education, the general  
25 public, school children are victims.

1           Anybody want to add anything?

2           MR. LOOBY: Your Honor, yes.

3           We wouldn't be opposed to a general argument that in  
4 a financial services fraud case, that the general public or  
5 the DOE is, I guess, the victim of the offense, but targeting  
6 specifically the school children ties back the risk to  
7 children's health and really conflates the charged offenses  
8 here with an offense, essentially, to put children's health at  
9 risk and we think it injects unfairly these inflammatory  
10 issues into the case and so an explicit appeal to the jury,  
11 say, an argument or from a juror, from a witness that the real  
12 victims here were the school children we submit would be  
13 improper.

14           THE COURT: Well, I don't know how it's going to be  
15 done, but is it prejudicial? Yes. Is it unfairly  
16 prejudicial? I don't think so. I mean, assuming the  
17 allegations are true, then school children were being fed  
18 chicken tenders that contained foreign matter.

19           Now, if it's not true, then it's not true, but I, to  
20 me, it is relevant, it is prejudicial but it's not unfairly  
21 prejudicial, and like anything, if the government makes too  
22 much of it, then I would sustain an objection. There comes a  
23 point when too much is too much. But in theory, it seems to  
24 me that they are part of the victims.

25           Next, Mr. Iller's motion in limine to preclude his

1 statement that his attorney could answer the question.

2 I'm inclined to grant that motion. I don't see  
3 how -- I think, I don't know what it shows. It's also fraught  
4 with danger. Frankly, it's an issue that could lead to a  
5 reversal. I would grant the motion.

6 I'll hear from the government if the government  
7 wants to add anything.

8 MS. ZUCKERWISE: Nothing to add, Your Honor. Thank  
9 you.

10 THE COURT: Okay.

11 The government's motion in limine, docket number 98,  
12 which is to permit testimony from a staff member who choked on  
13 a SOMMA chicken tender. I intended to cover this before.  
14 I'll allow it for the reasons previously articulated.

15 Motion number 1B: Admit evidence and argument on  
16 theories of bribery supported by facts alleged in the  
17 superseding indictment, even if not one of the four quid pro  
18 quos identified by the government.

19 My inclination is this. I don't see any references  
20 to the stream of benefits or opportunities arise theories. It  
21 seems to me that would be injecting new theories. I would not  
22 be inclined to allow that.

23 As to other examples of quid pro quos, I think it  
24 would be fair, you know, within reason, if there are some  
25 additional examples as long as they fit within the charged

1 conspiracies. I don't read the indictment as saying there  
2 were only four quid pro quos. The indictment carefully uses  
3 phrases like "for example," et cetera. That's where I'm at.

4 Anybody want to add anything?

5 MS. SAHARIA: Your Honor, just for the record, we do  
6 agree with Your Honor that the indictment does not charge a  
7 stream of benefits or as opportunities arise theory.

8 As to other quid pro quos, we did move for a bill of  
9 particulars and we filed a motion to dismiss on this point.  
10 The government then superseded and in opposing our motions,  
11 told us that they had identified the quid pro quos. We relied  
12 on that representation to the Court in not moving for a bill  
13 of particulars. We relied on that representation in being  
14 prepared to defend the quid pro quos in the indictment and we  
15 submit the government, for that reason, should not be able to  
16 present additional quid pro quos to a jury.

17 THE COURT: Are there other quid pro quos that the  
18 government wants to raise? Do we know or are we just talking  
19 hypothetically here?

20 MR. POLEMENI: Well, I think, Judge, the primary  
21 quid pro quo is the chicken for beef deal. It is the scheme  
22 which is I'm going to, Eric Goldstein, I am going to support  
23 your business before the DOE, I am going to get your chicken  
24 products into the DOE, and you are going to help me with this  
25 business.

1           So it's not that there are just four specific quid  
2 pro quo. There is an overarching conspiracy. There is an  
3 overarching bribery scheme in this case and we don't want to  
4 be --

5           THE COURT: The four quid pro quo are examples of  
6 support for that overarching theory.

7           MR. POLEMENI: Yes, Your Honor.

8           THE COURT: Are there -- I mean the way this was  
9 briefed, are there other specific examples of quid pro quo  
10 that you are going to want to introduce evidence on?

11          MR. POLEMENI: I mean to the extent that --

12          THE COURT: I mean I agree that you should be able  
13 to argue your main theory. That's your main theory.

14          MR. POLEMENI: Yes.

15          THE COURT: That's the case. And here are four  
16 examples of things that prove it up. I don't have a problem  
17 with that.

18          MR. POLEMENI: Right. We won't be saying, Judge,  
19 well, they paid for a plane ticket for him to go to Poland  
20 and, therefore, in exchange, he did X, Y, Z, and, jury, that's  
21 why you should find him guilty, but it is certainly evidence,  
22 again, of the overarching scheme so we are going to include --

23          THE COURT: There may be other things along the way  
24 where he received some consideration. You wouldn't  
25 necessarily call it a quid pro quo. It sounds like it would

1 be additional consideration --

2 MR. POLEMENI: Yes.

3 THE COURT: -- for the overall quid pro quo.

4 MR. POLEMENI: Yes, Your Honor.

5 THE COURT: Do you want to respond to anything? I  
6 mean it's hard to --

7 MS. SAHARIA: I understand. We're speaking, I  
8 think, in the abstract.

9 THE COURT: Yes.

10 MS. SAHARIA: I will say that the theory that was  
11 just articulated now, this overarching scheme of chicken for  
12 beef, that was not in their motion either. It is a new  
13 articulation of the scheme even from what they put in their  
14 motion. Their motion talked about promoting SOMMA's products  
15 in general and now we're hearing about a chicken scheme.

16 So we do have concern that the goal posts are going  
17 to continue to be shifted in that way and that scheme, I  
18 think, is too vaguely defined to qualify under McDonald so I  
19 do have some concerns about how it was just articulated. That  
20 sounds like an as-opportunities-arise theory that's not in the  
21 indictment.

22 THE COURT: I don't hear it as an  
23 as-opportunities-arise theory.

24 Did you want to add anything?

25 MR. POLEMENI: Judge, I'll just state, you know,

1 paragraph 12 of the indictment clearly states, it's the first  
2 paragraph, that the SOMMA defendants provided numerous  
3 benefits to the defendant Eric Goldstein including enticing  
4 Goldstein with potentially lucrative business opportunities  
5 and making monetary payments to Goldstein and RMSCO for his  
6 benefit, for Goldstein's benefit. And then it goes on to say  
7 what he did in exchange. Then paragraph 13 very clearly says  
8 that, you know, in a July 2015 meeting, Iler said that  
9 Goldstein told him: I'm going to buy a lot of chicken from  
10 you guys. Let's do the beef.

11 That we suggest, Your Honor, and allege is the  
12 overarching scheme here.

13 THE COURT: I don't have a be problem with what you  
14 just said. I will preclude adding the two theories: Stream  
15 of benefits and opportunities arise. If there are other  
16 examples, I don't know that I would call them quid pro quos,  
17 that support the existing theory, I would likely allow it  
18 subject to further, any further objections.

19 Next: Preclude evidence regarding findings reached  
20 by other government entities concerning alleged misconduct by  
21 the DOE officials.

22 Now, I'm not sure that -- as I understand it,  
23 defendants do not seek to elicit evidence of the conclusions  
24 reached in the other investigation.

25 Yes?

1 MS. SAHARIA: That's correct, Your Honor, we do not  
2 seek to admit the actual findings but evidence related to the  
3 investigations may be relevant in other ways.

4 THE COURT: I think that's probably true, and the  
5 government probably agrees that some of the evidence might be  
6 relevant to this claim. It's hard -- I mean, well, first let  
7 me say this.

8 The conclusions reached in the other investigations,  
9 in my opinion, are not relevant. You know, among other  
10 things, the DOI investigation, it was just a draft. It was  
11 looking at other issues. On the other hand, I think both  
12 sides are suggesting that there may have been statements along  
13 the way, specific evidence either uncovered or created as part  
14 of those investigations that could be relevant as long as they  
15 pertain to issues in this case.

16 It's hard for me to say none of it is -- I won't say  
17 none of it is admissible. I mean some of it might be  
18 admissible. Some of it might be admissible for impeachment,  
19 but I think that's the best I can do right now without knowing  
20 what specific things there are.

21 In other words, I'll grant the motion as to the  
22 conclusions reached in those investigations. I'll reserve  
23 decision on the admission of other evidence concerning the  
24 investigations.

25 What about the fact that there were investigations,

1 is that going to come in? Is that something the parties have  
2 talked about? Is that inevitably going to come in?

3 MR. POLEMENI: I don't know if it's inevitable. I  
4 don't believe that the government anticipates eliciting that  
5 sort of evidence or testimony at this point.

6 THE COURT: Okay.

7 MS. SAHARIA: I think it's possible, Your Honor.  
8 For instance, the fact that someone brought a complaint could  
9 be evidence of bias. I don't know whether it will be but it  
10 could be depending on the nature of the testimony at trial  
11 and, of course, if there's an opportunity to impeach using  
12 statements given to investigators, there will need to be some  
13 context to how those statements were provided, but we could  
14 figure out what the best --

15 THE COURT: I mean that's fair. At some point, if  
16 it comes out, I might have to give an instruction that you've  
17 heard evidence about other investigations, do not concern  
18 yourselves with those investigations or what conclusions might  
19 or might not have been reached. I can give something along  
20 those lines.

21 I mean I think I'm agreeing that there may be  
22 evidence, statements, et cetera, that could become relevant  
23 for both sides, but the government is not planning on  
24 eliciting the fact of investigations and we'll have to see,  
25 but just so it's clear, I do not think the conclusions or

1 tentative conclusions reached in those investigations are  
2 relevant.

3 Yes? Do you want to add something?

4 MR. POLEMENI: No, Judge.

5 THE COURT: No? Okay.

6 Motion number three: Preclude evidence or arguments  
7 regarding defendant's prior good acts, including their  
8 production of documents in response to grand jury subpoenas.

9 I'm not sure what this entails. I think complying  
10 with a subpoena is not relevant. I don't know what else there  
11 might be covered by this. I mean, in general, prior good acts  
12 is not relevant unless, just like prior bad acts, unless  
13 there's some reason for it to come in, but I don't, you know,  
14 complying with the subpoena I don't see as relevant.

15 MS. SAHARIA: May I be heard on that, Your Honor?

16 THE COURT: Yes.

17 MS. SAHARIA: I do think the government will intend,  
18 and we've heard some of that today, intend to put at issue the  
19 defendants' states of mind in 2017 and after the charged  
20 offenses with respect to concealing certain information and  
21 the government has raised in its motion its intent to argue  
22 that our client, Mr. Twomey, concealed information from a DOI  
23 investigation.

24 We do think that if the government is going to open  
25 the door with that kind of evidence, that it would be only

1 fair for us to respond with evidence that he voluntarily  
2 turned over documents to the grand jury. So if they're going  
3 to open the door --

4 THE COURT: I don't see how -- first of all, I don't  
5 know that it's voluntary if it's in response to a subpoena,  
6 number one, but number two -- look, the door may be opened on  
7 something, it's possible, and then you can renew the request  
8 at that point but right now, I don't see the relevance of  
9 compliance with subpoenas.

10 MS. SAHARIA: Understood.

11 As to the good acts issue, I think that's the kind  
12 of thing that will have to be taken up as it comes. We're not  
13 obviously going to argue that a prior good act is evidence of  
14 a tendency to be a good person, but this goes to the issue of  
15 whether, for instance, Mr. Goldstein did other things with  
16 respect to other school vendors that would show he did not  
17 treat SOMMA unusually, so there may be some relevance to those  
18 kinds of actions.

19 THE COURT: Well, that wouldn't be propensity  
20 evidence.

21 MS. SAHARIA: Exactly.

22 THE COURT: It's something different and we'll have  
23 to cross that bridge.

24 Just to be clear though, I don't want to spend a lot  
25 of time in front of the jury arguing motions. So if there are

1 these things that I've reserved on and that come up, you'll  
2 need to raise them before the jury gets here or at the break  
3 or at lunchtime or at the end of the day.

4 Motion number four: Preclude evidence or argument  
5 concerning food vendors other than SOMMA or allegations of  
6 misconduct on the part of non-defendant DOE officials.

7 I'm not sure, I'm not sure where we are with this  
8 and I think it may depend on what it is. I don't think it's  
9 relevant that a child choked on a meatball provided by another  
10 vendor in 2011, for example.

11 Actually, this is what I was thinking about the  
12 issue. If there's testimony that what happened here was  
13 unusual, then it may be, it may open the door to some other  
14 evidence. So we've kind of discussed this one already, I  
15 think. The bottom line is I think I need to reserve on this.  
16 I've provided some guidance I hope so far.

17 Does anyone want to add anything?

18 MS. SAHARIA: No, Your Honor.

19 MR. POLEMENI: No, Your Honor.

20 THE COURT: Okay.

21 Number five: Admit defendants' statements and  
22 preclude defendants from introducing their own hearsay  
23 statements.

24 I mean, in general, this is the rule. A defendant's  
25 statements, if they are relevant, can come in as an admission,

1 but other parts of the defendant's statements, if they're not  
2 relevant, are hearsay. There may be some exceptions for  
3 context, et cetera.

4 I think the government doesn't mention any  
5 statements specifically other than Mr. Turley's statements. I  
6 would grant the motion as to Mr. Turley's statements. I think  
7 it comes in. I think they come in as admission of a party  
8 opponent. As to others, I don't know what they are.

9 Yes?

10 MR. GOELMAN: Your Honor, the government offers  
11 Mr. Turley's statement and we have no issue with 801(d)(2)(b)  
12 or (d)(2)(a), that it applies one way and not the other way.  
13 We are not asking for equal treatment there. We are asking  
14 for equal treatment in terms of non-hearsay uses.

15 They say Mr. Turley told us something that wasn't  
16 true, we're offering this to show his consciousness of guilt  
17 but, defendants, you're not allowed to ask questions that he  
18 answered truthfully to show consciousness of innocence.

19 Relevance is a two-way street. So if it is not  
20 hearsay because it's not being offered for the truth of the  
21 matter, that applies for both parties, Your Honor.

22 THE COURT: Well, I think they're offering it, it's  
23 not hearsay because it's an admission.

24 MR. GOELMAN: They're saying it's not true so  
25 they're not offering it for the truth.

1           THE COURT: Well, I'm not sure what you're saying.  
2 You're still objecting to it coming in or you have other  
3 statements that you want to offer?

4           MR. GOELMAN: No. I'm objecting to the idea that  
5 they can offer it for a non-hearsay purpose but we can't offer  
6 truthful statements to negate the presumption of consciousness  
7 of guilt.

8           THE COURT: If there's something you want to offer,  
9 then run it by the government and they might agree, there are  
10 some exceptions, or I can cross that bridge when we get there.

11          MR. GOELMAN: Okay. I mean --

12          THE COURT: The Turley statements are admissible.  
13 If there are some other statements that you want to offer,  
14 I'll cross that bridge when we get there.

15          MR. GOELMAN: I'm sorry, Your Honor. I'm not being  
16 clear.

17          They're saying -- Mr. Turley was interviewed for a  
18 half an hour. He made a bunch of statements. They're saying  
19 we want to offer these four isolated snippets where he said  
20 things that we say aren't true. We want to ask the agent  
21 Mr. Turley also told you these other things during that  
22 interview that are true also for non-hearsay purpose, and even  
23 if it was hearsay, we would submit --

24          THE COURT: You want to ask the agent, you know,  
25 didn't Turley answer some questions truthfully?

1                   MR. GOELMAN: Yes, didn't he admit that he knew  
2 Mr. Goldstein, didn't he admit this, didn't he admit that,  
3 yes.

4                   THE COURT: Why doesn't that fall within the rule  
5 that you can't put in hearsay statements? You're not offering  
6 it for the truth; you're just offering it for the fact that he  
7 told the truth?

8                   MR. GOELMAN: Right. We're offering it for  
9 consciousness of innocence. It's not disputed whether or not  
10 those things are true, Your Honor. The parties agree that he  
11 met Goldstein in 2013.

12                  THE COURT: What's the response? Response?

13                  MS. ZUCKERWISE: Your Honor, the government  
14 anticipates that the testimony may go beyond those four  
15 statements and so agrees that it's a little premature to get  
16 into what would be required under the rule of completeness or  
17 for another purpose, and I think this is --

18                  THE COURT: Well, the argument is that it's not  
19 hearsay because they're not offering it for the truth. They  
20 would be offering it just to show that he was truthful.

21                  MS. ZUCKERWISE: Your Honor --

22                  THE COURT: I mean what does it show, that he  
23 answered some questions truthfully?

24                  MS. ZUCKERWISE: Certainly, Your Honor, he could be  
25 allowed some cross. In a vacuum, without looking at it as to

1 whether some questions were answered truthfully, but we're not  
2 there right now and we will be there, we respectfully submit  
3 that this is something that should be determined.

4 THE COURT: Yes, I'll reserve. I'll reserve on what  
5 you want to ask and maybe you can reach an agreement on it.

6 MR. GOELMAN: Thank you, Your Honor.

7 THE COURT: Okay. And as to other, I don't know  
8 what other specific statements there are. We'll have to deal  
9 with those when we know what they are.

10 Motion number six: Admit statements of the  
11 defendants' agents.

12 Defendants say the government hasn't identified any  
13 specific statements. I'm not sure what we're talking about.

14 MS. ZUCKERWISE: Your Honor, just to clarify the  
15 general principle --

16 THE COURT: Yes.

17 MS. ZUCKERWISE: -- many of the exhibits that the  
18 government plans to put into evidence are statements of  
19 defendants' agents. So rather than arguing about this, for  
20 each and every exhibit that the government attempts to admit,  
21 just to clarify, the general principles are to the extent the  
22 government lays a foundation, as I profess the government  
23 will, that these defendants or, excuse me, these witnesses  
24 were agents or these speakers, rather, in the e-mails were  
25 agents and that the testimony was in the scope of the agency,

1 et cetera, that they can be admitted.

2 THE COURT: Yes, I mean I know there is the  
3 requirement of a foundation. The agent employees must be  
4 directly responsible to the defendant employee. The statement  
5 must have been made about a matter within the scope of their  
6 relationship while it existed.

7 There are some -- you know, I'm aware of what the  
8 requirements are. It depends on the relationship, some of the  
9 context, so we'll have to see. I'm inclined to allow it as to  
10 Barrett, who as I understand it was directly responsible to  
11 Mr. Goldstein, but we can see if the foundation is laid, then  
12 we'll see.

13 MS. ZUCKERWISE: May I ask one clarifying point,  
14 Your Honor?

15 THE COURT: Yes.

16 MS. ZUCKERWISE: So based on Second Circuit case  
17 law, we don't read the "directly responsible" phrase to  
18 necessarily require that one person is someone else's direct  
19 report. So it would be helpful to get a sense of whether --

20 THE COURT: Well, I may have been relying on the  
21 defendants' brief for that. If the defendants overstated,  
22 then we'll take a look at it. I, I was relaying what I had  
23 read somewhere.

24 So you're disagreeing on what the standard is?  
25 We'll take a closer look at it.

1 MS. ZUCKERWISE: Okay, Your Honor.

2 THE COURT: Rioux and Zaken, we'll take a closer  
3 look.

4 MS. ZUCKERWISE: Thank you, Your Honor.

5 In particular, in Zaken, the Second Circuit found  
6 that an officer of a company is "in essence, directly  
7 responsible" to the owner of a company which shows not a  
8 formalistic type of assessment but, rather, requires a factual  
9 look at the actual relationship.

10 THE COURT: I'm not sure that the Second Circuit is  
11 being precise when it says, "in essence, directly  
12 responsible," but we'll see if we can figure it out.

13 Motion number seven: Preclude evidence or arguments  
14 about defendants' potential punishment or other consequences  
15 if granted.

16 The defendants concede they can't bring up the  
17 possible term of imprisonment and that, of course, is correct.  
18 I don't have a problem with defendants saying this case has  
19 serious consequences for the defendant. It does. So I don't  
20 know if there's anything more to it.

21 Anything more?

22 MS. SAHARIA: No, Your Honor.

23 THE COURT: Okay.

24 Motion number eight: Preclude defendants from  
25 introducing materials not disclosed to the government by

1 today.

2                   Where are we with that?

3                   MS. ZUCKERWISE: Your Honor, there's -- I'm sorry.

4                   MS. SAHARIA: Yes. So, Your Honor, our exhibit list  
5 I understand is due today. We will be, of course, producing  
6 it today.

7                   We did make a production of documents that will be  
8 on that exhibit list last week and are making another  
9 production of those documents today. So we will have  
10 disclosed the exhibits as of today that we intend to use in  
11 our case in chief.

12                  Now, of course we are learning new things about the  
13 government's case every day. They just amended their exhibit  
14 list over the weekend. So, of course, as these things go,  
15 there may be things we learn at trial and we discover we need  
16 to produce new documents in response and that's just how trial  
17 goes.

18                  THE COURT: The motion is granted so that defendants  
19 are precluded from introducing materials not disclosed by  
20 today with the caveat that if there is something that wasn't  
21 produced for good cause, I would consider allowing it, but  
22 there's got to be some good cause such as the government doing  
23 something to only raise the issue belatedly. All right?

24                  MS. SAHARIA: Yes, Your Honor.

25                  THE COURT: Motion number nine, which is part of the

1 government's opposition ECF 99: Preclude the testimony of  
2 defendants' proposed expert witnesses Clayton Gillette,  
3 Parthapratim Basu and George Stamas.

4 Gillette, who wants to be heard? Yes?

5 MR. GRUBIN: If I may, just very quickly, I think we  
6 also covered Dr. Basu so I believe we can move that to the  
7 side.

8 THE COURT: Agreed.

9 MR. GRUBIN: For Professor Gillette, just the  
10 proffered expert testimony is completely irrelevant to the  
11 case for just a host of reasons.

12 I mean just quickly, the expert disclosure that they  
13 provided states that he's going to provide an opinion  
14 concerning whether under New York law, a contract, this DOE  
15 contract permits the DOE to impose liquid damages on a  
16 manufacturer, I assume that means SOMMA, and also ask whether  
17 it permits it on the manufacturer, again, meaning SOMMA, when  
18 they make a full delivery to the distributor, when they fail  
19 to make a full delivery to the distributor but the distributor  
20 approves substantive goods to the department. So that's  
21 irrelevant for a number of reasons.

22 The first is what the evidence is going to show is  
23 that everyone at the DOE, the staff making the decisions,  
24 believed that they, including the contracting office, believed  
25 they could impose liquid damages on the distributor, the

1 distributors that came to the schools, and they agreed they  
2 could and that they would be imposing a fine on the  
3 distributors.

4 The evidence will also show -- I brought some of the  
5 evidence with me: Text messages, e-mails. It's very clear.  
6 The evidence will show that the SOMMA defendants were very  
7 concerned and they strategized about how to get Goldstein to  
8 intervene and then, you know, they decided to, our allegation  
9 is they decided to bribe him by sending him a PowerPoint  
10 presentation reminding him of how much money he'll make with  
11 them.

12 That's what matters. It doesn't matter that five  
13 years later, an expert is going to come in and say that, look,  
14 under the rules of construction and the reading of these  
15 different regulations and the contracts, that actually they  
16 could not impose a fine. It doesn't matter if a fine could or  
17 could not have been imposed. What matters is what, is that  
18 DOE officials thought they were going to, the SOMMA officials,  
19 the SOMMA defendants thought they were, and they intervened,  
20 that they had a corrupt intent. That's what matters, not that  
21 a SOMMA litigation down the road --

22 THE COURT: Let me hear from defense counsel. I'll  
23 hear from defense counsel.

24 MR. GRUBIN: Sure.

25 MR. LOOBY: Yes, Your Honor.

1           So the defense will show that there was one DOE  
2 witness adamant on imposing the fine not on the distributor,  
3 but on SOMMA. As Mr. Gillette's disclosed opinion shows, the  
4 contract did not provide for liquidated damages on a vendor  
5 like SOMMA who was not a party to that contract. The evidence  
6 will also show that the SOMMA defendants and the DOE  
7 interacted regarding arguments around these legal issues,  
8 around whether or not the contract provided for that.

9           The defendants are entitled to argue that they did  
10 not have a motive to bribe or a corrupt intent, as the  
11 government alleges, because they were simply pointing out that  
12 the DOE did not have the authority --

13           THE COURT: The argument is that the DOE personnel  
14 thought they could impose fines and that the defendants bribed  
15 them not to.

16           MR. LOOBY: Right. Well, actually, Your Honor --

17           THE COURT: And so, therefore, it's irrelevant  
18 whether the contract provided for liquidated damages.

19           MR. LOOBY: Well, a lower level employee of the DOE  
20 believed they could. Ultimately, the DOE did not do that, and  
21 the jury is going to be asked to assess whether or not the  
22 ultimate decision by the DOE was because the DOE was following  
23 the law and not imposing an illegal fine or whether or not  
24 that is a quid pro quo. And evidence surrounding the fact  
25 that the government's witness who is pressing that she wanted

1 to impose the fine, that she was wrong which the government  
2 has not contested, the contract can't be read that way, is  
3 relevant to everybody's understanding of the dispute.

4                  From the SOMMA defendants' perspective, there is no  
5 motive to, corrupt motive to bribe when you are raising  
6 legitimate, and the evidence will show, a well thought out  
7 e-mail pointing out these very same points and from  
8 Mr. Goldstein's perspective, ultimately, that the DOE went the  
9 right route, did the right thing, it's not a complete defense  
10 to a bribery allegation like the cases the government cites,  
11 but it's certainly relevant and the government in its  
12 opposition is conflating --

13                THE COURT: The government cites some law that an  
14 expert can't opine on the parties' obligations under a  
15 contract.

16                MR. LOOBY: Your Honor, those cases primarily deal  
17 with situations where legal opinion is offered on the ultimate  
18 issue which is on the laws and regulations under which a cause  
19 of action accrues and it's being litigated.

20                So they cite that, the Diners case from the '70s,  
21 that's a real seminal case on this point and it's about  
22 whether or not -- the disputed issue in that case was whether  
23 or not the parties used their best efforts to sell a stock, to  
24 register a stock, and the expert there opined this is what  
25 best efforts means and, you know, I think as matter of law,

1 they did not, and the court held that that encroached on the  
2 jury's function.

3                  Here, this testimony is going to provide essential  
4 background that does not come anywhere close to the ultimate  
5 issue in the case under the statutes that are alleged but is  
6 critical for the jury to understand and evaluate the  
7 government's allegation that this action by the DOE was taken  
8 only because of a bribe or principally because of a bribe or  
9 in any way because of a bribe because the DOE did the right  
10 thing, the DOE did not impose an illegal fine, and the  
11 government's witness who was asking for that to happen is  
12 legally incorrect and this is all relevant.

13                  THE COURT: Yes.

14                  MR. GRUBIN: Just a couple of things.

15                  The first is that what matters, and the cases the  
16 government cited on this and the defense responded and  
17 cited --

18                  THE COURT: What about on the issue of intent, does  
19 it go to the issue of intent?

20                  MR. GRUBIN: No, because it's, you could -- we cited  
21 a bunch of cases.

22                  THE COURT: The argument is there was no reason,  
23 there was no reason to bribe, not to fine because they  
24 couldn't fine.

25                  MR. GRUBIN: Right. You could bribe -- I mean, the

1 things we said, right, in Alfisi, the Second Circuit case,  
2 there's still corrupt intent when you're bribing to procure  
3 lawful action or what you believe to be lawful action from a  
4 government official, and that cites the Blagojevich case, I'm  
5 pronouncing his name wrong, the former governor's name wrong,  
6 but the Seventh Circuit case, right, where they're saying --

7 THE COURT: I'm going to reserve decision. I'll  
8 issue something probably tomorrow. If not tomorrow, then  
9 Wednesday. I want to just go back. I think there's a summary  
10 of his testimony as an exhibit.

11 MR. LOOBY: Yes, it's appended to our reply.

12 MR. GRUBIN: Judge, the only thing I'll add is that  
13 the summary, the testimony that he's offering is about a fine  
14 on distributors. No one -- or manufacturers, excuse me, which  
15 would be SOMA. No one in our -- we're not going to offer  
16 evidence or suggest that a fine could have been imposed on  
17 SOMMA. It's that a fine could have been imposed on the  
18 distributors. So it's irrelevant for that entire other reason  
19 too, Your Honor.

20 MR. SUNDARAM: Your Honor, if I can just add one  
21 thing.

22 THE COURT: Yes.

23 MR. SUNDARAM: With respect to Mr. Goldstein, the  
24 government is accusing him and charging him of intentionally  
25 giving preferential treatment to SOMMA based on his business

1 relationship. So it's hard for me to fathom how, if that's  
2 their accusation, that it's not relevant that what  
3 Mr. Goldstein, the position he took was consistent with the  
4 contract and consistent with the law. That is some evidence  
5 that the reason he did it was on the merits.

6 If somebody is doing something on the merits, that  
7 needs to come in if they're being accused of doing something  
8 to give, out of self-interest to give their partners  
9 preferential treatment.

10 THE COURT: I'll reserve decision.

11 MR. GRUBIN: Okay.

12 THE COURT: And George Stamas, the government does  
13 not object to him testifying as an expert on limited liability  
14 corporations. The concern was that there was a little  
15 fuzziness in the language?

16 MR. GRUBIN: Yes, Your Honor. I mean, again, the  
17 new amended Rule 16 is very clear about what's required and it  
18 applies to both sides because expert litigation --

19 THE COURT: Let me ask defense counsel whether  
20 Stamas is going to provide anything else other than what was  
21 disclosed.

22 MR. LOOBY: Your Honor, we think our disclosure is  
23 clear and it is the testimony that we would offer as of this  
24 moment, this is what we would intend to offer through him.

25 I think the government's motion reaches a little bit

1 further than that and takes advantage of the situation where  
2 the government is going to put on its case first. Of course,  
3 the rules require us to disclose the opinions that we intend  
4 to offer, but evidence at trial, you know, may come in  
5 differently than we expect in which case, Mr. Stamas could  
6 have been opinion or a variation on an opinion that could be  
7 relevant.

8 THE COURT: Mr. Stamas will be limited to what he  
9 provided in his disclosure. If he wants to add anything new  
10 because of something that developed during the trial,  
11 defendants will have to show good cause and I'll rule on it  
12 then.

13 MR. LOOBY: Thank you, Your Honor.

14 THE COURT: Okay?

15 MR. M. KELLY: Your Honor, Michael Kelly on behalf  
16 of Brian Iler.

17 THE COURT: Yes.

18 MR. M. KELLY: One clarifying point. We put forth  
19 the testimony of Dr. Basu. I want to be clear, we weren't  
20 limiting it to just the recall issue.

21 Part of what he's going to testify about, and it's  
22 included in the disclosure, is that SOMMA was not at fault for  
23 the foreign material that was in the chicken, that that fault  
24 resided both in the manufacturer as well as the supplier and  
25 he's going to base his testimony on federal regulations.

1           I just want to be clear in case that was still an  
2 issue that that is what we still intend to do particularly in  
3 light of the Court's ruling that --

4           THE COURT: Well, how does he know whether SOMMA was  
5 at fault or not at fault?

6           MR. M. KELLY: He knows based on his 30-some years  
7 as a regulator, Your Honor, in interpreting federal safety  
8 regulations which put the obligation on what's called the  
9 official establishment which is the entity that has the USDA  
10 license, that has the inspectors onsite, and that is  
11 responsible for producing food that is safe in the stream of  
12 commerce.

13           THE COURT: My understanding was that Dr. Basu was  
14 going to opine that the holds should have been denominated a  
15 recall and it sounds like that's not a relevant issue. That's  
16 the basis of my ruling.

17           MR. M. KELLY: Understood on that issue, but I want  
18 one or two others that we put forward, so I didn't want to be  
19 pigeonholed on that.

20           THE COURT: Well, I didn't focus on the other two  
21 issues. What are the other two issues?

22           MR. M. KELLY: The other two issues was who was at  
23 fault for the foreign material in the chicken tenders and the  
24 second issue was SOMMA's response once the chicken, the  
25 foreign material is identified, whether or not that was

1 reasonable from his perspective as a former federal regulator.

2 THE COURT: What's the government's response?

3 MR. GRUBIN: It doesn't, none of this -- to bring in  
4 an expert to talk about who is civilly liable for food, for  
5 food and foreign matter in the chicken, none of that matters.  
6 That's not what the case is about. It doesn't matter who's  
7 civilly liable. The government is not going to say that SOMMA  
8 is liable. At the end of the day though, SOMMA was putting  
9 food in, they had problems, they needed help from Goldstein  
10 and they went to Goldstein. That's what matters. This is a  
11 sideshow and to bring in an expert to talk about place of  
12 establishment in civil liability and as a manufacturer  
13 versus --

14 THE COURT: Well, in other words, even assuming it  
15 was another company that was directly responsible for the  
16 foreign matter, it was still SOMMA that put it to the  
17 Department of Education.

18 MR. GRUBIN: Of course. Correct, Your Honor.

19 MR. M. KELLY: And, Your Honor, my quick response is  
20 I would agree with that if there wasn't going to be focus on  
21 food safety in the trial.

22 THE COURT: My ruling stands. I'll preclude the  
23 testimony of Dr. Basu.

24 Okay. The government submitted an April 28th  
25 letter, document number 102. It's a Giglio motion:

1 Cross-examination of unnamed government witnesses; allegations  
2 from the qui tam action; cross-examination of Mr. Barrett  
3 about his likely dementia.

4 It's hard to, hard to evaluate without knowing what  
5 we're talking about. I think we covered the prior  
6 investigations and the results thereof. It's unclear about  
7 specific evidence relating to the investigation.

8 What about Mr. Barrett's health? The defendants  
9 want to cross-examine Mr. Barrett about his dementia?

10 MR. SAHARIA: I think the government agrees in its  
11 motion that his memory is relevant. They just asked for some  
12 undefined limit on questioning. I can't know what we will or  
13 will not do without seeing him on the stand but, of course,  
14 we're not going to harass Mr. Barrett, intentionally do not.

15 THE COURT: Okay.

16 Are there other specific statements that we should  
17 talk about today or what?

18 MR. GRUBIN: Your Honor, briefly one thing that  
19 wasn't covered by the motion that I just wanted to raise for  
20 the Court.

21 One of the government's witnesses, Romano, is the  
22 accountant for RMSCO and it so happens that he was also the  
23 accountant, Your Honor, for one of the AUSAs on the case prior  
24 to joining the case. Once on, the AUSA notified DOJ's Ethics  
25 office. Everyone said it's fine, it's not a big deal, there's

1 no payments owed, no work has been done since they've joined  
2 the case and, you know --

3 THE COURT: Do the defendants want to cross-examine?

4 MR. ROMERO: I should have told them earlier. We  
5 have no issue with this, Your Honor.

6 MR. GRUBIN: Great. Thank you. That's it,  
7 Your Honor.

8 THE COURT: Any other specific issues to discuss?

9 MR. GRUBIN: Thank you.

10 Just one other one on Samantha Biletsky. They may  
11 not have had a chance to see it but I sent it this morning but  
12 I did send records from the State Controller's Office that  
13 she, in fact, resigned, you know, months after this whole  
14 investigation. So there is no, at this point, good faith  
15 basis for crossing her on an incorrect New York Post article  
16 saying that she was fired.

17 THE COURT: Do defense want --

18 MR. N. KELLY: It was produced today. We'll have to  
19 look at it.

20 THE COURT: Okay.

21 MR. GRUBIN: That's fine.

22 THE COURT: Any other specific witnesses or issues?

23 MS. SAHARIA: I don't believe so, Your Honor.

24 THE COURT: If anything else comes up, you'll let me  
25 know.

1           I have all these motions to quash. Initially, there  
2 was an error on the face of it referring to the former clerk.  
3 Now the error has been fixed. The subpoenas have also been  
4 narrowed.

5           I don't believe I have a response from the  
6 government. Another letter came in around 2 o'clock from SCI  
7 and I don't know if defendants want to respond to that.

8           MR. WARREN: Your Honor, Zack Warren.

9           The motions that were filed, there's three motions  
10 now. There's one from the government, one from the SCI and  
11 one from DOI.

12           The defense has responded to most of the motions.  
13 There's an additional fourth motion that came in which is to  
14 preclude testimony from certain SCI investigators. So that  
15 subpoena at issue in the motion today has nothing to do with  
16 documents. The document subpoena issue is ripe, Your Honor,  
17 and I'm happy to address that.

18           THE COURT: Did the government respond to the  
19 narrowed subpoenas?

20           MS. McTAGUE: No, Your Honor, but I am prepared to  
21 do so today.

22           THE COURT: Okay. Let's hear from the government  
23 first then.

24           MS. McTAGUE: Your Honor, despite the revisions made  
25 on the subpoenas since the initial batch was sent out by the

1 defense, it is the government's position that the revised  
2 subpoenas are still overbroad, overly burdensome and are being  
3 used by the defense as a means of bypassing the discovery  
4 process.

5 Many of the subpoenas seek materials related to  
6 prior statements of prospective witnesses as well as personnel  
7 records going back several years and they're, therefore, being  
8 used solely for the purpose of impermissible impeachment.

9 Your Honor, there are a number --

10 THE COURT: There's a legal question as to what  
11 17(h) means. I think the parties disagree about that.

12 MS. McTAGUE: That's correct, Your Honor. I can go  
13 through each of the subpoenas at this time. That will likely  
14 be lengthy.

15 THE COURT: I don't want to. And I haven't really  
16 had time. I mean some of this stuff came in today. Some of  
17 it came in yesterday or Friday. I haven't had time really to  
18 look at it all in any, in any detail. On the other hand, I'm  
19 concerned that we need to get this done.

20 Let me ask defense counsel to comment. It does have  
21 the feel of discovery, you know, last minute, last minute,  
22 near last minute subpoenas for still a wide number of  
23 documents and it has the feel of discovery when we should be  
24 focusing on trial.

25 MR. WARREN: A few things to that, Your Honor.

1           First off, most of what is sought in the subpoenas  
2 is prior statements of government witnesses. That cannot  
3 possibly be characterized as discovery. Those are prior  
4 inconsistent statements by the government's witnesses. And  
5 let me just set the record on what actually happened here,  
6 Your Honor.

7           The government's trial witnesses were interviewed  
8 repeatedly by SCI and DOI investigators on the exact issues or  
9 many of the issues in this case, specifically, whether or not  
10 certain vendors received preferential treatment. Those  
11 witnesses were asked about SOMMA foods. They gave information  
12 about SOMMA foods which is, of course, the company at issue in  
13 this case.

14           The government did not produce those statements. We  
15 fought, as Your Honor well remembers in the context of the  
16 qui tam complaint, and at last, after that fight, the  
17 government turned over materials that were not only relevant  
18 and material to the defense but highly exculpatory. We asked  
19 the government to produce additional interview memos and  
20 witness statements relating to the government's own witnesses  
21 on the relevant issues and the government responded that those  
22 documents were not in its possession, custody and control.

23           So we said, okay, we'll go get them from the  
24 agencies that do have those statements. Again, we noted that  
25 they were relevant and they relate specifically to government

1       witnesses. We sent a subpoena to those agencies that's now  
2       very narrowly tailored to obtain interview memos relating  
3       specifically to the allegations in this case.

4                  The government says that Rule 17(h) precludes us  
5       from doing that. That's not right, Your Honor. Rule 17(h) is  
6       a corollary to the Jencks Act and Rule 26.2. What 17(h) says  
7       is it says, Look, when you're trying to get a witness  
8       statement from the government, the way to do it is through the  
9       Jencks process. Right? The witness testifies and then you  
10      get the statement. That obviously doesn't apply to statements  
11      that are not in the possession, custody and control of the  
12      government which is a position that they're taking here.

13                 So we're trying to go get those statements that the  
14      government has said it will not produce, under the Jencks Act,  
15      we're trying to go get those statements from the agencies that  
16      possessed them and there's plenty of cases saying that  
17      Rule 17(h) does not apply in that situation.

18                 So all we're trying to do is go get prior  
19      inconsistent statements by the government's witnesses --

20                 THE COURT: How do you know that they are  
21      inconsistent?

22                 MR. WARREN: I know, Your Honor, because the few  
23      examples that the government has produced so far are  
24      inconsistent with the statements that the witnesses have made  
25      to the FBI agents. Witnesses are now telling the FBI agents

1 that there was preferential treatment and misconduct. We have  
2 examples of memos that the government has produced where the  
3 witnesses said there was no preferential treatment.

4 I can't imagine something that is more important and  
5 relevant in a criminal case to be able to impeach a government  
6 witness with his or her prior inconsistent statement.

7 THE COURT: Does the government want to add  
8 anything?

9 MS. McTAGUE: Yes, Your Honor.

10 First, towards the Rule 17(h), relying on United  
11 States versus Zhu and United States v. Vasquez, Rule 17(h)  
12 applies only to witness statements already in the government's  
13 possession. These statements are not in the government's  
14 possession. The argument --

15 THE COURT: Right, but that's why they're trying to  
16 subpoena them from the other agencies.

17 MS. McTAGUE: Yes, Your Honor, but the fact is that  
18 they are not inconsistent. The memorandum that they have is  
19 sufficient to cross-examine the witnesses. And the scope of  
20 which the defense, the scope of the material of which the  
21 defense is seeking is incredibly overbroad.

22 Pointing out to the subpoena most recently issued to  
23 SCI, it notes all summaries, memorandum, audio recordings,  
24 video recordings in regards to several witnesses concerning  
25 not only the defendants but all other DOE food vendors. This

1 is a fishing expedition. Sub 4: The documents or  
2 communications, audio recordings and video recordings that  
3 were produced or given to you in connection with case number  
4 and then it cited the SCI case number.

5 That investigation was an extremely broad  
6 investigation that went through the DOE's relationship with  
7 all food vendors and then also concerned itself regarding  
8 travel reimbursements with other food vendors. That is  
9 broadly beyond the scope of what is at issue at this trial.  
10 So to request these materials that are largely irrelevant and  
11 inadmissible is a fishing expedition and especially in regards  
12 to a subpoena that was sent to Ms. Asher, that is an end run  
13 around the discovery process in the qui tam litigation.

14 What they asked of Ms. Asher is: "Documents  
15 sufficient to show each instance between January 1, 2010 and  
16 December 31, 2016, when the New York City Department of  
17 Education imposed liquidated damages on an approved brand food  
18 manufacturer or supplier," and then listed out different  
19 situations where an unnamed distributor may have acted in a  
20 particular way.

21 That is overbroad. The scope of this goes back over  
22 a decade. Ms. Asher, as a single employee, cannot reasonably  
23 comply with this on the eve of trial.

24 Noting further for what they're requesting of  
25 Ms. Asher: All documents and communications including,

1 without limitation, e-mails, voicemails, text messages or  
2 other messages sent on phone or computer applications with  
3 several DOE employees between January 1, 2015 and the present,  
4 not only concerning defendant SOMMA, Defendant Goldstein, but  
5 Department of Education food vendors.

6 Not only are these broad overly burdensome requests,  
7 but they specifically make note of documents relating to the  
8 lawsuit and complaints filed against the New York City  
9 Department of Education. That is the pending qui tam action.  
10 This is an end run around the protective order that is in  
11 effect right now and as well as the civil litigation  
12 discovery.

13 THE COURT: Okay. Thanks.

14 Yes? Final word.

15 MR. WARREN: Final word. I just want to respond to  
16 this idea that we are not allowed to use Rule 17(h) to  
17 subpoena impeachment material. There's no case law support  
18 for that.

19 THE COURT: I will look at that. I am concerned  
20 about how broad the subpoenas are, the Asher one.

21 MR. WARREN: The Asher subpoena asks for her  
22 communications on a very narrow set of topics with particular  
23 individuals relating to the allegations --

24 THE COURT: You're saying narrow. The government is  
25 saying really broad. I'll take a look at it.

1 MR. WARREN: Okay. I would just say --

2 THE COURT: The problem is -- I'll take a look at it  
3 and try to rule tomorrow or Wednesday so that the parties have  
4 an idea.

5 This has to stop, by the way. I can't keep  
6 getting -- there's so many issues. It just -- this is  
7 ridiculous. There's so many submissions. I understand this  
8 is very important but this is unlike, frankly, any case I've  
9 ever been on. I don't know what the problem is but the  
10 volume, the frequency, I don't understand, and the length of  
11 things. Let's just be judicious about this, you know, and  
12 hopefully, I understand we want to rule on all these issues  
13 and get them out of the way but right now, things are not  
14 going very smoothly and I hope we do better next week.

15 Anything else that we need to talk about today?

16 MS. SAHARIA: Your Honor, I just wanted to raise a  
17 few logistical issues that I think resulted from the  
18 conference that you had last week.

19 THE COURT: Yes.

20 MS. SAHARIA: So, first, you had asked about -- I  
21 think you had given us your draft preliminary instructions.

22 THE COURT: Yes.

23 MS. SAHARIA: I just wanted to report we don't have  
24 any objections.

25 THE COURT: Yes. I wasn't giving it to you for

1 objections. That's what I always do.

2 MS. SAHARIA: I just want to say they are written as  
3 if it's a single defendant case.

4 THE COURT: I will take care of that.

5 MS. SAHARIA: Sure.

6 THE COURT: You asked for what my -- this is my  
7 standard. I'm going to do things like change it to plural.

8 MS. SAHARIA: Okay.

9 THE COURT: What else?

10 MS. SAHARIA: Okay. You had asked about the Percoco  
11 decision and whether that has any effect on the jury  
12 instructions.

13 THE COURT: Yes.

14 MS. SAHARIA: I think the answer is they don't  
15 materially change our submissions.

16 THE COURT: Okay.

17 MS. SAHARIA: We will submit a letter to Your Honor  
18 that will be one page.

19 THE COURT: You don't need a letter. I have it on  
20 the record.

21 MS. SAHARIA: Great.

22 And just as an FYI, we are meeting and conferring  
23 with the government about the joint statement of the case for  
24 the voir dire.

25 THE COURT: Actually, there was some description in

1 the proposed voir dire, so that could be the start, but if you  
2 want to --

3 MS. SAHARIA: We started with that and then we  
4 proposed some revisions to that.

5 THE COURT: That's fine.

6 MS. SAHARIA: And then I think I expect there will  
7 be some issues for us to address with the Court regarding the  
8 protective order and sealing issues but we're going to address  
9 it with the government in the first instance and come back to  
10 the Court hopefully with an agreement and if not an agreement,  
11 then we'll have to resolve it at some point in time.

12 THE COURT: That's fine.

13 Anybody have anything else?

14 MR. POLEMENI: No, Your Honor.

15 MS. SAHARIA: No, Your Honor.

16 THE COURT: I mean we're going to -- if there's some  
17 time, if we're waiting for our jury to come up, we can cover  
18 some of these other issues. If not, we'll do it at a break or  
19 at the end of the day, some of the open items but, hopefully,  
20 I'll deal with them in the next couple of days. Okay?

21 See you all on Tuesday.

22 MR. GRUBIN: Thank you, Judge.

23 (Matter concluded.)

24

25